Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

FLORIDA DEPARTMENT OF INSURANCE,

Petitioner,

v.

CHASE BANK OF TEXAS NATIONAL ASSOCIATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

PREFACE: The Fifth Circuit ruled the Florida Department of Insurance had no standing under Florida's receivership laws to pursue the claims of policyholders and third-party claimants. Florida, as Receiver of an insolvent insurance company, sought to pursue breach of trust and fraud claims against the former Trustee (Chase) of a National Association of Insurance Commissioner's Trust that was to provide security for policyholders and third-party claimants. The Florida Supreme Court previously has recognized that the issue of the Department's standing under Florida receivership laws is of great public importance and that there is no controlling precedent. The State of California, ancillary receiver, filed an *amicus* brief in support of Florida's request for certification. The Fifth Circuit refused certification without comment. The Question Presented is:

Whether under proper principles of federalism the question of the standing of the Florida Department of Insurance under the receivership laws of Florida should have been certified to the Supreme Court of Florida as authorized by the Florida Constitution, Statutes, and Rules of Court.

INTERESTED PARTIES

Petitioner. Florida Department of Insurance, Domiciliary Receiver of Western Star Insurance Company, Ltd., an Antigua corporation.

The California Department of Insurance, Ancillary Receiver of Western Star, filed an *Amicus* Brief in support of Florida's appeal and an *Amicus* Brief in support of Certification and Rehearing.

Respondent. Chase Bank of Texas National Association, f/k/a Texas Commerce Bank National Association, f/k/a Ameritrust of the Texas National Association.

Chase is wholly owned by J. P. Morgan & Chase Co., which is publicly traded on the New York Stock Exchange.

TABLE OF CONTENTS

Page

Question Presented i

Interested Parties ii

Table of Contents iii

Table of Authorities iv

Opinions Below 1

Jurisdiction 1

Florida Constitution and Rules of Court Allowing Certification 2

Statement of the Case 3

1. Request for Certification of Florida's Standing to Florida Supreme Court 3

2. Factual Background of Claims over which Florida Claims Standing 7

Reasons Why Certiorari Should Be Granted 12

Conclusion 24

TABLE OF AUTHORITIES

Page

CASES

Arizonans for Official English v. Arizona, 520 U.S. 43 (1997) 18

Armory v. Delamirie, 93 Eng. Rep. 664 (1722) 21

Arthur Anderson LLP v. Superior Court of Los Angeles County, 67 Cal. App. 4th 1481 (1998) 16

Caplin, Trustee v. Marine Midland Grace Trust, 406 U.S. 416 (1972) 6, 14, 15

Donovan v. Bierwirth, 754 F.2d 1094 (2d Cir. 1985) 21

Florida Dept. of Insurance v. Chase Bank, 274 F.3d 924 (5th Cir. 2001) and is reprinted in Appendix A ("App. A") 1

Gee v. Seidman, 653 So. 2d 384 (Fla. 1995) 5, 16

State of Fla. Dept. of Ins. v. Blackburn, 633 So. 2d 521 (Fla. 2d DCA 1994) 6

Texas Commerce Bank National Association v. State of Florida, et al., 138 F.3d 179 (5th Cir. 1997) 11

United States v. South-Eastern Underwriters, 322 U.S. 533 (1944) 14

CONSTITUTION, STATUTES AND RULES

Constitution of the State of Florida, Article V, Section 3 ..... 2, 16, 17

15 U.S.C. §1011, McCarran-Ferguson Act 14, 22

28 U.S.C. §1254 1

28 U.S.C. §1783 20

Florida Statutes §25.03 3

TABLE OF AUTHORITIES – Continued

Page

Florida Statutes, Part I, Chapter 631 ..... *passim*

Florida Rules of Appellate Procedure, Rule 9.150 2

United States Supreme Court Rule 13 1

ARTICLES

Bradford R. Clark, *Ascertaining the Laws of Several States: Positivism and Judicial Federalism after Erie*, 145 U. Pa. L. Rev. 1459, 1555-56 (1997)..... 18

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at *Florida Dept. of Insurance v. Chase Bank*, 274 F.3d 924 (5th Cir. 2001) and is reprinted in Appendix A ("App. A"). By separate orders, the Fifth Circuit denied the Petition for Rehearing on January 15, 2002, *Fla. Dept. of Ins. v. Chase Bank*, 2002 U.S. App. LEXIS 2739 (5th Cir. 2002) reprinted Appendix D ("App. D") and denied Petitioner's Request for Certification that had been incorporated with the Petition for Rehearing on February 6, 2002, reprinted Appendix C ("App. C"). The prior January 14, 2000, order of the Northern District of Texas that upheld standing is reported at 2000 WL 36065 (N.D. Tex.) reprinted Appendix B ("App. B"). The February 9, 2001, summary judgment order of the district court that was appealed by Florida is reported at 2001 WL 124951 (N.D. Tex.).

JURISDICTION

The decision of the United States Court of Appeals for the Fifth Circuit was entered on November 30, 2001. The timely Request for Certification and Petition for Rehearing was denied on January 15, 2002. By separate order on February 6, 2002 the Court denied the Request for Certification to the Supreme Court of Florida. This Petition for Certiorari has been filed within ninety (90) days from the denial of Rehearing. This Court has jurisdiction under 28 U.S.C. §1254 and Supreme Court Rule 13.

FLORIDA CONSTITUTION AND RULES OF COURT ALLOWING CERTIFICATION

The Constitution of the State of Florida, Article V, Section 3, provides:

> (b) JURISDICTION – The supreme court:
>
> * * *
>
> (6) May review a question of law certified by the Supreme Court of the United States or a United States Court of Appeals which is determinative of the cause and for which there is no controlling precedent of the supreme court of Florida.

Florida Rules of Appellate Procedure, sets forth procedures for Certification:

> **Rule 9.150. Discretionary Proceedings to Review Certified Questions from Federal Courts**
>
> (a) **Applicability.** On either its own motion or that of a party, the Supreme Court of the United States or a United States court of appeals may certify a question of law to the Supreme Court of Florida if the answer is determinative of the cause and there is no controlling precedent of the Supreme Court of Florida.
>
> (b) **Certificate.** The certificate shall contain the style of the case, a statement of the facts showing the nature of the cause and the circumstances out of which the questions of law arise, and the questions of law to be answered. The certificate shall be prepared as directed by the federal court. It shall be certified to the Supreme Court of Florida by the clerk of the federal court.

(c) **Record.** The Supreme Court of Florida, in its discretion, may require copies of all or any portion of the record before the federal court to be filed if the record may be necessary to the determination of the cause.

(d) **Briefs.** The brief of the party designated by the federal court as the moving party shall be served within 20 days of the filing of the certificate. Additional briefs shall be served as prescribed by rule 9.210.

(e) **Costs.** The costs of these proceedings shall be divided equally between the parties unless otherwise ordered by the court.

The Florida legislature also has authorized certification under Florida Statutes §25.03.

STATEMENT OF THE CASE

1. REQUEST FOR CERTIFICATION OF FLORIDA'S STANDING TO FLORIDA SUPREME COURT

The United States Court of Appeals for the Fifth Circuit ruled that the Florida Department of Insurance, as the Receiver of an insolvent insurance company, lacked standing under the laws of Florida to pursue claims on behalf of policyholders and third-party claimants against the former trustee (Chase) of a National Association of Insurance Commissioners Trust Agreement (App. A). The NAIC Trust was to provide "security for policyholders and third-party claimants." The district court in denying Chase's Motion to Dismiss previously had upheld standing (App. B). This appeal was from a subsequent order on

the merits granting Chase's Motion for Summary Judgment and denying Florida's Motion. On appeal from those orders, the Fifth Circuit, *sua sponte*, ruled no standing:

> Florida lacks direct standing to bring claims to recover for injuries that are not its own or Western Star's, and does not have representational standing to proceed on behalf of the policyholders. (App. A-14.)
>
> * * *
>
> Assuming that Florida *could* designate its Insurance Commissioner as the automatic representative of policyholders in the prosecution of their fraud and breach of trust claims, it has not evidenced an intent to do so. (App. A-23.)

Under the language and purpose of Part I, Chapter 631, Florida Statutes, Florida had claimed standing exists:

> **631.001 Title, construction, and purpose. –**
>
> (1) This part constitutes and may be cited as the "Insurers Rehabilitation and Liquidation Act."
>
> (2) This part may not be interpreted to limit the powers granted the Department of Insurance by other provisions of law.
>
> (3) This part shall be **liberally construed** to effect the purpose stated in subsection (4).
>
> (4) The purpose of this part is the **protection of the interests of insureds, creditors, and the public generally**, through:
>
> (a) . . .
>
> (b) . . .

(c) Enhanced efficiency and economy of liquidation through clarification and specification of the law to minimize legal uncertainty and litigation;

(d) Equitable appointment of any unavoidable loss, and

(e) Lessening the problems **of interstate rehabilitation and liquidation by facilitating cooperation between states** in the liquidation process and by extension of the scope of personal jurisdiction over debtors of the insurer outside this state.

[Emphasis added.]

Based upon the Fifth Circuit's holding of no standing, Florida filed a Request for Certification to the Florida Supreme Court which was incorporated as Ground One of the Petition for Rehearing. The Fifth Circuit was advised in the Certification Request that the matter was of great public importance to Florida and other states because of reciprocal state laws regulating liquidation of insurance companies with multi-state contacts.

The Florida Supreme Court previously had recognized that the standing question of the Florida Department of Insurance to pursue fraud claims of policyholders and third-party claimants under the receivership law of Florida was of "great public importance" to the State of Florida and that there was no controlling precedent, but dismissed review because the standing issue was not involved. *See Gee v. Seidman*, 653 So. 2d 384 (Fla. 1995).

The Fifth Circuit opinion did not discuss certification to the Florida Supreme Court (App. A). The Court's subsequent order denying certification and rehearing did not state any reasons (App. C and D). Florida noted in its Rehearing Petition and Certification Request the rationale of the only Florida case involving Chapter 631 cited by the Fifth Circuit, *State of Fla. Dept. of Ins. v. Blackburn*, 633 So. 2d 521 (Fla. 2d DCA 1994) would support the Receiver's standing. Florida advised in the Certification Request that there is no applicable precedent by the Florida Supreme Court. Florida also suggested to the Fifth Circuit that its reliance on this Court's decision in *Caplin, Trustee v. Marine Midland Grace Trust*, 406 U.S. 416 (1972) involving the trustee's standing under the federal bankruptcy statute was misplaced. This Court in *Caplin* expressly had recognized this was a choice open for Congress (the dissent asserted the then existing federal statute conferred standing).

Florida claimed standing based on the language of the Florida Statute, Chapter 631, Part I. Florida requested certification to enable the question of standing under the Florida statute to be answered by the Supreme Court of Florida. Florida further stated it would request the Florida Supreme Court to expedite the matter.

Florida's Request for Certification and Petition for Rehearing set out the specific questions to be certified:

QUESTIONS REQUESTED TO BE CERTIFIED

Whether the Florida Department of Insurance, as domiciliary receiver of an insolvent insurance company, has standing under the laws of Florida,

including Part I, Chapter 631, Florida Statutes, to pursue claims on behalf of policyholders and third-party claimants for the benefit of the estate, including:

> *(a) Breach of Trust and fiduciary duty claims against the former trustee of the NAIC Trust for loss of the Trust Fund established for the protection of policyholders and third-party claimants.*
>
> *(b) Fraud claim against the former trustee to recover damages by policyholders and third-party claimants, the Trust's beneficiaries, for (i) property and personal injury claims under Western Star policies, including subrogating claims; and (ii) recovery of premiums paid by policyholders for worthless insurance.*

The State of California (Ancillary Receiver) filed an *amicus* brief in support of Florida's Request for Certification. The Fifth Circuit opinion had recognized that under California law the California Department has standing to represent the interests of policyholders. (App. A-23.) See discussion, "Why Certiorari Should be Granted," *infra*.

2. FACTUAL BACKGROUND OF CLAIMS OVER WHICH FLORIDA CLAIMS STANDING

Although the ruling on standing is jurisdictional, the Fifth Circuit chose to make several comments in dicta to justify the consequence of no relief for the trustee's (Chase's) misconduct. The following facts are for the limited purpose of placing the standing question in context with Florida's claims. Florida's claims are discussed in the district court's order of January 14, 2000 (App. B),

denying Chase's Motion to Dismiss and upholding Florida's standing. Responses to the Fifth Circuit opinion rejecting standing are set out in Reasons Why Certiorari should be Granted.

The insolvent insurance company, Western Star, an Antigua Corporation illegally operating out of Florida (where it was de facto domiciled) was marketing insurance in California. In order to comply with California emergency regulations, Western Star needed to have a National Association of Insurance Commissioner ("NAIC") Standard Form Trust Agreement. The trustee needed to be a qualified member of the Federal Reserve System and had the sole obligation under the NAIC Trust to accept trust assets and certify the value of trust assets. The former trustee knowingly executed the NAIC Trust Agreement that falsely stated the trustee had received and was holding in its "actual and sole possession" $5.4 million in cash or other assets specifically defined by the Trust Agreement. The trustee subsequently accepted, as the sole trust asset, a certificate of deposit from the First Asian Development Bank in Vanuatu, a private unregulated bank in the South Pacific that falsely stated on its face that the trustee had lodged a cash deposit of $5.4 million United States dollars. Neither the trustee nor the insurance company had deposited anything in First Asia.

Notwithstanding its knowledge of the absence of real funds, the trustee expressly represented to the State of California and insurance agents and brokers that they were holding $5.4 million in trust assets with a $5.4 million market value and, indeed, continued to verify the facially false certificate of deposit. Following execution of the Trust Agreement in Texas and notification of the Trust

to California surplus lines brokers in March of 1993, over 18,000 policies were accepted and placed by California brokers with over $6 million paid in premiums. After the receipt of a cease and desist order issued in June 1993 by the California Department of Insurance, no new policies were placed by surplus lines brokers with an effective policy date after June 30. Premiums, however, continued to be collected until Florida was able to put Western Star into receivership a year later.

The purpose of the NAIC Trust and the emergency California regulations was to provide the domiciliary commissioner (here, Texas where the Trust was executed) or the court-appointed receiver (here, Florida) under the Trust Agreement with real liquid assets that would be immediately available for payment of claims in the event of the insurance company's insolvency. The Texas Department in September 1993 had refused to accept the First Asia CD upon being warned by California. After Florida placed Western Star into receivership in June 1994, Texas deferred to the Florida Department as domiciliary receiver.

California, where almost all the policies were sold and losses were incurred, is the ancillary receiver. Under reciprocal state laws involving receiverships of insolvent insurance companies with multi-state contacts, Florida, as domiciliary receiver, has the primary responsibility to marshal assets so the estate can be properly administered in compliance with state laws and federal due process. The NAIC Trust provided the court appointed "Receiver [Florida]" was entitled to recover the "loss to the Trust"

for the trustee's "gross negligence or willful misconduct."[1]

On December 8, 1994, Florida demanded the $5.4 million Trust Fund Minimum from the trustee (Chase). The former trustee refused to turn over the $5.4 million it had acknowledged as receiving on the basis that it did not have anything of any value. The worthless certificate

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[1] Paragraphs 3.2 and 4.4 of the Trust Agreement attached as an exhibit to the complaint and filed in the summary judgment papers provided:

> **3.2** ***Trustee's Duties and Liability***. Trustee's duties and responsibilities shall be determined solely by the express provisions of this Agreement and no other duties or responsibilities shall be implied. Trustee shall be liable for the safekeeping and administration of the Trust Fund in accordance with these provisions. **Trustee shall not be liable for any loss to the Trust Fund other than losses caused by its own gross negligence or willful misconduct.** The Company agrees to indemnify and hold harmless the trustee . . . **unless** such claims, losses, damages or other payments arise as a result of the Trustee's own **gross negligence or willful misconduct**. (Emphasis added.)
>
> **4.4** ***Transfer of Trust Assets to Domiciliary Commissioner in Event of Insolvency***. In the event that the Trust becomes insolvent as specified in Paragraph 4.1 and notwithstanding the provisions of this Article 4 or any other provisions in this Agreement, the Trustee shall comply with an order of the Domiciliary Commission or court of competent jurisdiction directing the Trustee to transfer to the Domiciliary Commissioner **or other designated Receiver** all of the assets of the Trust Fund except those assets which are necessary to satisfy the Trustee's Priority Claims . . . . [Emphasis added.]

of deposit had been cancelled by the First Asia Development Bank which had withdrawn from its operations in Vanuatu. Over seven years of continuous litigation in both state and federal trial and appellate courts in Florida and Texas ensued.[2] This culminated in the Fifth Circuit's unprecedented ruling that Florida lacks standing under Florida law to pursue the breach of trust claim and to pursue the fraud claim set out in the complaint filed below.

Without recovery under the breach of trust claim for the loss to Trust Fund, there were insufficient funds in the estate to pay policy claims, or even to give notice to all policyholders and other claimants, or to determine the amount of the claim allowed, or to provide opportunity to object for final determination by the receivership court.[3] In addition, under the trustee's fraud claim, the

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[2] Chase's predecessor, Texas Commerce, attempt to enjoin the Florida Receiver's action in Florida courts was denied. *Texas Commerce Bank National Association v. State of Florida, et al.*, 138 F.3d 179 (5th Cir. 1997). The Florida State court action for fraud and breach of trust was removed and then dismissed for lack of personal jurisdiction. The summary proceeding for turnover was dismissed by the receivership court for lack of jurisdiction as the former trustee did not hold any property of any value. The instant suit was then filed in the Northern District of Texas where the trustee resided.

[3] The Florida Receiver had acknowledged that claims filed with the insurance company prior to receivership would be deemed filed in the estate and has provided in its summary judgment record detailed documents showing all policy numbers and names (as well as 900+ prior existing claims with $2.9 million in adjusted amounts, with 200 claims still open). An affidavit of an independent adjuster stated there were 600 additional unadjusted claims.

18,000 policyholders who paid over six million in premiums for worthless insurance (backed by the trustee's false word to insurance brokers and regulators of real Trust Fund assets) also would be entitled to receive refunds.[4]

The district court granted summary judgment for Chase and denied summary judgment for Florida. On appeal, the Fifth Circuit held Florida did not have standing under Florida law to represent the interests of policyholders and third-party claimants and affirmed denial of relief. (App. A.) Florida's Request for Certification and Petition for Rehearing were denied by the Fifth Circuit in separate orders without comment. (App. C and D.)

REASONS WHY CERTIORARI SHOULD BE GRANTED

The heart of American federalism has been the good faith cooperation of the federal sovereign in sharing power with the several states and the good faith cooperation between and among the several states. These principles of federalism, embodied in the Constitution and laws of the United States and of the several states, are present in this proceeding: (a) Congress has entrusted control of insurance industry to the states and the states have

[4] The names, addresses, and the amount of premiums paid by each policyholder, as well as the effective date of the policy and when the policies were placed and reported to the Insurance Department by the surplus lines brokers, were filed and cited in the Summary Judgment papers. There were no funds to proceed further.

accepted this responsibility; (b) Florida claims standing under Florida laws to exercise its duties as receiver to pursue breach of trust and fraud claims against the former trustee of a National Association of Insurance Commissioners form trust; and (c) the trust, executed in Texas as security for policyholders and third-party claimants, was used with the trustee's support by an off-shore insurance company illegally operating from Florida to market policies in California.

The Fifth Circuit rejected Florida's standing under Florida law and refused without stated reason Florida's Request for Certification to the Florida Supreme Court. This request was supported by the *amicus* State of California, ancillary Receiver. Under principles of federalism, certiorari should be granted and the requested questions of Florida's standing either certified to the Florida Supreme Court by this Court or the matter remanded to the Fifth Circuit with directions to certify the requested questions to the Florida Supreme Court.

The denial of standing seriously impairs the abilities of the Florida Department of Insurance to fulfill its duties and responsibilities under the insurance receivership laws of Florida and the reciprocal insurance laws of other states, as well as the enforcement of the standard form trusts by the National Association of Insurance Commissioners. The ruling cast doubt on the standing of all states that have statutes similar to Florida's Chapter 631. These state statutes uniformly are designed for the specific purpose to protect policyholders and the public. Almost all large receiverships involve multi-state contact and reciprocal cooperation among state departments of insurance.

Under principles of federalism, Congress, following this Court's ruling in *United States v. South-Eastern Underwriters*, 322 U.S. 533 (1944) that the business of insurance is interstate commerce, has chosen that the states should be granted the primary power and responsibility to control and regulate the business of insurance. After the passage of the McCarran-Ferguson Act, 15 U.S.C. §1011, the states have not only provided extensive regulation governing the insurance industry, but also have enacted reciprocal provisions governing receiverships of insolvent insurance companies with multi-state contacts. The principal insurance officers of all 50 states are members of the National Association of Insurance Commissioners whose Standard Form Trust Agreement for Surplus Alien Lines coverage was subject of the suit below.

Florida's existing and ongoing receiverships involve protection for literally several million individual policyholders and third-party claimants who reside not only in Florida but throughout the United States. The public importance of the federalism issues presented is of great public importance to Florida and California. Federalism governs the national responsibility shared by all states in administering insurance receiverships.

The very arguments set forth in the Fifth Circuit opinion especially warrant certification under principles of federalism. The Fifth Circuit principally relied upon this Court's ruling in *Caplin, Trustee v. Marine Midland Bank Trust Company*, 406 U.S. 416 (1972), construing the federal bankruptcy statute. The Fifth Circuit's discussion, however, omitted a very salient observation in the majority opinion:

> This does not mean that it would be unwise [for Congress] to confer such standing on trustees in reorganization.

Id. at 434.

The minority opinion had construed the then existing bankruptcy statute to confer standing.

Under federalism, the policy questions of the breadth of the standing of the state agency should not be the unchecked prerogative of the Fifth Circuit or the federal judiciary. It is often said the receiver stands in the "shoes" of the insolvent entity. Florida and other states may want to give the receiver "bigger shoes." The Florida statute provides it "shall be liberally construed to effect the purpose . . . protection of the interests of insureds, creditors, and the public generally through . . . [l]essening the problems of interstate rehabilitation and liquidation by facilitating cooperation between states in the liquidation process . . . ." Chapter 631, Part I, Florida Statutes. See pp. 4-5, *supra*.

It may be in bankruptcy cases such as the present Enron debacle that multiple class actions will be filed because of the federal trustee's limited standing. Insurance companies are not eligible to file for federal bankruptcy protection. Liquidation and rehabilitation is entirely the responsibility and duty of the states. The states should not be bound by the model Congress has chosen for bankruptcy trustees. States should be allowed to choose a less restrictive standing so receivers of insolvent insurance companies can have "bigger shoes" to protect that interest of policyholders and third-party claimants by a consolidated administration of the estate.

This refusal to certify is inexplicable. The Fifth Circuit opinion recognized that some states, such as California, the ancillary receiver, have been conferred such standing (App. A-23). *See Arthur Anderson LLP v. Superior Court of Los Angeles County*, 67 Cal. App. 4th 1481, 1495 (1998). The Fifth Circuit opinion cites no state case that rejects standing of its Department of Insurance. The California court recognized the insurance receiverships are fundamentally different from ordinary receiverships as the focus of the law is for the "protection of the policy-buying public." *Id.* at 1486. This is directly analogous to Florida's Chapter 631 "for protection of policyholders, creditors, and the public generally" and the NAIC Trust purpose to protect "policyholders and third-party claimants." The California court observed: "The Insurance Commissioner hence represents far broader interests than those typically represented by an ordinary receiver, whose potential claims are limited to those of the company in receivership." *Id.* at 1486.

The Supreme Court of Florida previously had recognized that the issue of standing of the Florida Department of Insurance under Chapter 631 was of "great public importance" to the State of Florida, *Gee v. Seidman*, 653 So. 2d 384, 385 (Fla. 1995). The *Gee* proceeding was dismissed because the question certified by the Florida Third District Court of Appeal "specifically stated it did not address the issue" as then required for certification from Florida state courts by the Florida Constitution, Article V, Section 3(b)(4). In this case, the Fifth Circuit holding is directly based upon Florida Department of Insurance's lack of standing. Jurisdiction of the Florida

Supreme Court to answer Certified Questions from federal appellate courts expressly exists under Article V, Section 3(b)(6) set out on p. 2, *supra*.

Certification from federal courts to state supreme courts fosters principles of federalism. The guidelines for when certifications should be granted and when declined is a significant issue of public importance for all states and the proper administration of justice by federal courts. The proper principles of federalism governing the use of certification by federal courts need to be resolved by this Court. The public policy of the State of Florida as manifested in its Constitution and Rules of Court favor certification. This should be recognized and respected.

One commentator arguing for a presumption in favor of certification analogized the *Chevron* doctrine to the certification debate and stated:

> The constitutional structure supports an analogous presumption in favor of certifying ambiguous questions of state law to state courts. Like ambiguous federal statutes, ambiguities or "gaps" in state law present opportunities for the exercise of significant policymaking discretion by those who must resolve them. As Professor Manning has explained, *Chevron's* presumption "that Congress allocates interpretive authority to agencies rather than courts" implements "a constitutional commitment to [federal] policymaking by more, rather than less, representative institutions." Likewise, a presumption in favor of certifying unsettled questions of state law would effectuate the constitutional preference for state policymaking by agents of the state rather than federal courts. Thus, the Supreme Court's decision in *Chevron* to adopt a

> presumption necessary to implement the constitutional separation of powers supports the recognition of an analogous presumption in favor of certification in order to further constitutional principles of judicial federalism and the twin aims of *Erie*.

Ascertaining the Laws of Several States: Positivism and Judicial Federalism after Erie, Bradford R. Clark, 145 U. Pa. L. Rev. 1459, 1555-56 (1997) (citations omitted).

The holding, rationale, and dicta of the Fifth Circuit in rejecting Florida's standing and refusing to certify unfortunately serve to frustrate the principles of federalism endorsed by Congress and traditionally recognized and enforced by this Court. This Court recently encouraged the prompt certification of issues that had direct impact upon administration of state laws. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 77 (1997), observing certification helps "build a cooperative judicial federalism."

The insurance receivership laws are to protect the public interest. Questions about the standing powers of a state receiver have significant public impact. Instead of certifying the standing issue to the Florida Supreme Court, the Fifth Circuit suggested alternatives that should be the prerogative of the State of Florida. Confronted with the reality that "many wrongs but no rights is not the hallmark of either Texas or Florida jurisprudence," the Fifth Circuit suggested that after seven and one-half years of continuous litigation, Florida could possibly embark on a new voyage using a class action boat: "Without expressing an opinion on the merits of any particular option, policyholders might bring a class action to

attempt fraud or breach of fiduciary duty claims against a NAIC trust. . . . " (App. A-22.)

The Fifth Circuit acknowledged its suggested alternative solutions were not guaranteed. Indeed, they could prove illusory. More significantly, under federalism, the choice of the proper voyage and ship should be made by the various state legislatures. The states individually should be able to set the parameters of standing for their state department of insurance acting as receiver of an insolvent insurance company. The opinion unfortunately overlooks this principle and offers no reason for the refusal to certify the controlling and jurisdictional issue of Florida's standing to the Florida Supreme Court.

The Fifth Circuit opinion further rationalizes its rejection of Florida's standing under Florida law by speculating that policy claimants would receive little and belittles that the receiver without any real trust assets has insufficient funds available for proper determination of the amount of valid claims. Florida would suggest to this Court that such statements are the very reasons why certification should have been granted and why certiorari needs to now be granted by this Court. Without considering the full faith and credit aspect of federalism, the opinion attacked the integrity and fairness of the Florida receivership laws and procedures:

> Indeed, the Florida receiver overtly endorses a "pay first, establish damages later" approach, demanding $5.4 million from Chase up front, to be used for any and all purposes under the Liquidation Act priority scheme, including payment of administrative claims first. Not only

> might a flat $5.4 million recovery be incommensurate with actual damages, but conceivably any such recovery could go entirely to the cost of estate administration, with little remaining to compensate injuries suffered by those on whose behalf these claims are ostensibly brought. (App. A-15.)
>
> 30. Where a receiver has effectively appropriated policyholder claims, and any recovery is applied in part to the estate's administrative claims, due process might well be implicated. (App. A-14.)

Under federalism, the insurance laws of the State of Florida and the reciprocal insurance laws of California and other states are entitled under 28 U.S.C. §1783 to be given full faith and credit by the federal courts. This may not be refused based upon good thoughts or intentions or on a "prudential basis for rejecting Receiver standing to assert policyholder claims in federal court," as the Fifth Circuit stated in note 31 of its opinion. (App. A-14.) The federal courts should not make policy decisions based upon their preference for the extent of standing the state should confer or upon incorrectly perceived views of the efficacy of states and their receivership laws.

The very purpose of the NAIC Trust and the 1992 California Emergency Regulation was to transfer the entire Trust Fund Minimum to the court appointed "Receiver" upon insolvency. This would allow the receiver to determine and pay claims. The reciprocal state laws for administration of insolvent insurance companies, including Florida's, are intended to maximize protection of policyholder and third-party claimants. Standing of the court appointed Receiver under the NAIC

Trust should not be defeated because of the Fifth Circuit's misconception of Florida law. All fifty states have provisions for liquidation of insolvent insurance companies. These receivership laws fully comport with due process – notice – opportunity to be heard, and prompt and fair judicial review.

Florida assures this Court that upon recovery of funds from the former trustee (Chase) there will be compliance with due process notice and prompt and fair claim payment to policyholders and third-party claimants. Western Star was insolvent because the trustee's represented value of the $5.4 million NAIC Trust to pay policy claims was not true. There is no record basis to suggest or imply that the State of Florida has violated or will violate its responsibility to regulate insurance that has been entrusted by federal law and will fail to fairly pay claims.

The Fifth Circuit's dicta criticizes the Receiver's Summary Judgment proof of damages. As the Fifth Circuit recognizes, the former trustee lied about the trust assets. Ever since the "Chimney Sweeps' Jewel Case," *Armory v. Delamirie*, 93 Eng. Rep. 664 (1722), courts have ruled, "once a breach of trust is established, the uncertainty in fixing damages will be resolved against the wrongdoer." *Donovan v. Bierwirth*, 754 F.2d 1094, 1056 (2d Cir. 1985). Accordingly, there is no need or just cause to criticize receiver's efforts as justification for denying standing. Instead, there is a real need for certification of Florida's standing to the Florida Supreme Court. The receiver did produce competent evidence of injury (see pp. 11-12, *supra*) but, without recovery for the total loss to the missing Trust Fund, it was impossible to administer the

estate to determine either the exact or total amount of allowed claims. The Fifth Circuit's Catch 22 argument (receiver cannot have trust fund until after amount of claims are proven which requires receiver's use of trust fund to determine) rejects the federalism cooperation that the Fifth Circuit should have accorded to the administration of Florida's receivership laws.

While voicing its misgivings about Florida having standing under the laws of Florida, the Fifth Circuit even advised in gratuitous dicta that if a state chose to grant standing that it might violate Article III standing for a federal court to entertain such suits. (App. A-7-12.) It is difficult to fathom why the Florida Receiver's suit against the NAIC Trustee would be devoid of constitutional standing – both have direct stakes under the NAIC Trust and Chapter 631 to provide protection for policyholders and third-party claimants in the event of the insurance company's insolvency.

The hostile reaction to the Florida receiver's effort to recover the $5.4 million loss to the Trust Fund serves to disavow the very federalism espoused by Congress under the McCarran-Ferguson Act, 15 U.S.C. §1011. Whatever the basis of belief or intuitive source for the Fifth Circuit's misgivings, no matter how well intended and how highly principled, the parameters for the standing of state department of insurance as receiver must be governed by state law.

The Florida Supreme Court has fully endorsed its federalism responsibilities under the Florida Constitution and has consistently accepted certification from federal

appellate courts. It would be unprecedented for the Florida Supreme Court to decline certification involving the standing of an important state agency such as the Florida Department of Insurance to exercise its statutory powers, duties, and functions. The United States Court of Appeals for the Eleventh Circuit, which includes Florida, has generally availed itself of the certification opportunity. Apparently, the United States Court of Appeals for the Fifth Circuit is more chary concerning certification. Florida Supreme Court rules governing certification, pp. 2-3, *supra*, provide for a prompt briefing schedule. Florida will request the Florida Supreme Court to expedite the matter and believes the Court will rule accordingly.

CONCLUSION

Certiorari should be granted and Florida's Requested Questions for Certification, pp. 6-7, *supra*, either certified to the Florida Supreme Court by this Court or the matter remanded to the Fifth Circuit with directions to certify the requested questions to the Florida Supreme Court.

Respectfully submitted,

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APPENDIX INDEX

Florida Department of Insurance v. Chase Bank,
274 F.3d 924 (5th Cir. 2001)..... Appendix A

Florida Department of Insurance v. Chase Bank,
2000 WL 36065 (N.D. Tex.).....Appendix B

Florida Department of Insurance v. Chase Bank,
Fifth Circuit Order Denying Request for Certification February 6, 2002 .....Appendix C

Florida Department of Insurance v. Chase Bank,
2002 U.S. App. LEXIS 2739 (5th Cir. 2002) Fifth Circuit Order Denying Petition for Rehearing January 15, 2002..... Appendix D

APPENDIX A

United States Court of Appeals,
Fifth Circuit.

FLORIDA DEPARTMENT OF INSURANCE,
as receiver of Western Star Insurance Company, Ltd.,
Plaintiff-Appellant,

v.

CHASE BANK OF TEXAS NATIONAL ASSOCIATION,
formerly known as Texas Commerce Bank National Association, formerly known as Ameritrust of Texas National Association, Defendant-Appellee.

No. 01-10272.

Nov. 30, 2001.

William J. VanDercreek (argued), Dallas, TX, *Donald O. Colleluori*, Figari, Davenport & Graves, Dallas, TX, W. Scott Newbern, Tallahassee, FL, *John W. Frost, II, Robert J. Aranda*, Frost & Saunders, Bartow, FL, for Plaintiff-Appellant.

Kirte Matheu Kinser, Roger B. Cowie (argued), Locke Liddell & Sapp, Dallas, TX, for Defendant-Appellee.

Mark P. Richelson, Donald R. Currier, Los Angeles, CA, for State of California, Amicus Curiae.

Appeals from the United States District Court for the Northern District of Texas.

Before *REAVLEY, HIGGINBOTHAM* and *PARKER*, Circuit Judges.

REAVLEY, Circuit Judge:

The Florida Department of Insurance (Florida), receiver for Western Star Insurance Company, appeals the

district court's order granting Chase Bank of Texas's Motion for Summary Judgment, and denying Florida's Cross-Motion for Summary Judgment. The district court dismissed Florida's claims for fraud and breach of fiduciary duty against Chase Bank, who was trustee of a trust established to (1) allow Western Star to conduct business in California, and (2) provide assets as security for policyholders. Because Florida lacks standing to sue on behalf of the policyholders, and because it has not raised a disputed issue of material fact with respect to the claims raised on behalf of Western Star, we affirm the judgment of the district court.

BACKGROUND

The facts are largely undisputed. Western Star was an insurance company, based in Antigua, selling surplus line insurance in California. Although Western Star was not admitted as an insurance company in California, it conducted business there on the assumption that it could do so unless California regulatory authorities entered a cease and desist order against it. In November 1992, California passed a law requiring that every alien surplus line insurer establish a trust containing at least $5.4 million to create a readily available pool of assets for payment of claims. Compliant trusts were to be established by May 25, 1993.

Western Star contacted Ameritrust, whose successor in interest is Chase Bank of Texas (Chase), to establish an acceptable trust. In February 1993, Western Star and Chase executed a trust instrument largely patterned on

the NAIC (National Association of Insurance Commissioners) standard trust instrument, approved by California regulators. The trust agreement provided that Western Star "desires to establish a trust fund in the United States as security for said Policyholders and Third Party Claimants and to qualify as an eligible or approved surplus lines insurer therein." As the trust settlor, Western Star funded the trust on March 10, 1993 with a certificate of deposit issued by First Asia Development Bank, which had a face value of $5.4 million.

Almost immediately, Chase sent a letter to insurance brokers in California informing them that Western Star had established a trust account at Chase worth $5.4 million. On March 18, 1993, Western Star's sponsoring broker in California repeated this information in a notice to "All Brokers." Beginning in April, Western Star sold thousands of insurance policies in California.

In May 1993, the California Department of Insurance asked Western Star and Chase for additional information about the trust agreement and the First Asia certificate of deposit. Chase responded with a "certification" to the Department that the trust assets had a market value of $5.4 million; this document may have been filed with the California Department of Insurance as part of Western Star's Surplus Line Insurance application package around May 21, 1993. For reasons that are not clear from the record, the initial application was rejected, but Western Star refiled the application on June 1, 1993. The Department of Insurance continued to find the CD suspicious and, on June 15, 1993, denied the application and ordered brokers to cease and desist selling Western Star policies in California.

California was rightly suspicious; the CD was worthless. Issued by First Asia Development Bank, an unregulated bank from the South Pacific Republic of Vanuatu,[1] the CD stated, "Ameritrust Texas National Association [Chase], as Trustee for Western Star Insurance, Ltd., Antigua has lodged a deposit in the amount of United States Dollars Five Million and Four Hundred Thousand only."[2] In fact, neither Western Star nor Chase had deposited any money with First Asia Development Bank. Instead, Western Star was "renting" the CD from Europe-America Capital Corporation, in what is euphemistically described as a "credit enhancement" transaction. The CD could not be drawn on by the holder.[3]

In 1994, unpaid insurance claims against Western Star were mounting. A Florida state court placed Western Star into receivership, and appointed the Florida Insurance Commissioner as the domiciliary receiver and the California Insurance Commissioner as ancillary receiver. The Western Star receivership estate does not have sufficient assets to pay policyholder claims, and may not even have enough money to pay all of the Florida receiver's administrative costs.

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[1] The Republic of Vanuatu is located between Australia and Fiji.

[2] Chase concedes that Ameritrust itself was not the depositor with First Asia, but contends it thought the CD wording was designed only to make the CD payable to Ameritrust rather than Western Star.

[3] First Asia canceled the CD prior to the commencement of receivership proceedings. First Asia has since vanished from Vanuatu.

During preliminary litigation, a district court in the Northern District of Texas discharged Chase from any further obligations as trustee when Chase tendered the CD into the court registry. The discharge order did not, however, determine the value of the trust assets, or consider liability Chase might have incurred for conduct relating to its duties as trustee.[4] Florida originally filed the instant suit against Chase in Florida state court, but that case was dismissed for lack of personal jurisdiction. Florida subsequently brought this action against Chase in the Northern District of Texas. Although the California Insurance Commissioner has filed an amicus brief in this appeal, it is not a plaintiff in the present suit against Chase, nor is any individual policyholder a party to this action.

DISCUSSION

Summary judgment is reviewed de novo,[5] and is appropriate when, viewing the evidence in the light most favorable to the nonmoving party, no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law.[6] After a defendant properly moves for summary judgment, the non-movant plaintiff must bring forward sufficient evidence to demonstrate

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[4] *See Texas Commerce Bank Nat'l Ass'n v. Florida*, 138 F.3d 179, 181-82 (5th Cir. 1998).

[5] *Maher v. Strachan Shipping Co.*, 68 F.3d 951, 954 (5th Cir. 1995).

[6] *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

that a genuine issue of material fact exists on every element of a claim.[7]

Difficulties in this case arise in part because the briefing does not clearly distinguish between the various theories of liability by identifying to whom a duty was breached and the proper measure of damages with respect to each claim. Some of Florida's theories rely on breaches of duty to the policyholders, while others rely on breaches of fiduciary and trust duties by Chase to Western Star directly. Disentangling the various theories of liability is crucial to determining whether the elements of each have been properly identified, and whether the record reveals a disputed issue of material fact on every required element.

A. Policyholder Claims and Florida's Standing

At the 12(b)(6) Motion to Dismiss stage of this case, the district court denied Chase's motion to dismiss Florida's claims on behalf of the policyholders for lack of standing. Although the parties have not briefed the standing issues as part of this appeal, standing is a component of Article III's case or controversy requirement, and is jurisdictional in nature.[8] Standing must exist for a suit to proceed:

> In its constitutional dimension, standing imports justiciability: whether the plaintiff has

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[7] *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1196 (5th Cir. 1986).

[8] *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 475-76, 102 S. Ct. 752, 760, 70 L. Ed. 2d 700 (1982).

> made out a "case or controversy" between himself and the defendant. . . . As an aspect of justiciability, the standing question is whether the plaintiff has "alleged such a personal stake in the outcome of the controversy" as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf.[9]

As articulated by the Supreme Court in *Lujan v. Defenders of Wildlife*,[10] the elements of constitutional standing are: (1) that the plaintiff have suffered an "injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent"; (2) that there is "a causal connection between the injury and the conduct complained of"; and (3) that the injury is likely to be redressed by a favorable decision.[11] Under *Lujan*, courts must carefully examine whose injury is at issue, and to whom the recovery will go. If the plaintiff is not the party who sustained the concrete and particularized injury for which a remedy is sought, and is not the assignee or designated representative of the injured party,[12] then it does not have standing. "The *Art. III* judicial power exists only to redress or otherwise to

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[9] *Warth v. Seldin*, 422 U.S. 490, 498-99, 95 S. Ct. 2197, 2205, 45 L. Ed. 2d 343 (1975) (emphasis in original).

[10] 504 U.S. 555, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992).

[11] *Id.* at 560-61, 112 S. Ct. at 2136 (citations omitted).

[12] *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773-74, 120 S. Ct. 1858, 1863, 146 L. Ed. 2d 836 (2000) (holding that a qui tam relator under the False Claims Act is a combination agent and assignee of the United States' claims, who has "representational standing" to sue for the government).

protect against injury to the complaining party, even though the court's judgment may benefit others collaterally."[13]

In *Caplin v. Marine Midland Grace Trust Co. of New York*,[14] a case similar in many respects to the present one, the Supreme Court held that a trustee in bankruptcy did not have standing to bring claims against a third party on behalf of creditors of the insolvent corporation. In *Caplin*, a company called Webb & Knapp issued debentures worth $8,600,000 and pledged to limit its debt-equity ratio, which would be certified by an annual report to Marine Midland Trust. Subsequently, Webb & Knapp's debt sky-rocketed, but Marine failed to report inflated appraisals of the value of Webb's assets. When Webb entered bankruptcy, the trustee in bankruptcy sued Marine on behalf of the debenture holders, "seeking to recover the principal amount of the outstanding debentures as damages for Marine's alleged bad-faith failure to compel compliance with the terms of the indenture."[15]

The Supreme Court held that the trustee lacked standing to bring the action against Marine on behalf of the debenture holders. First, the Court focused on the

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[13] *Warth*, 422 U.S. at 499, 95 S. Ct. 2197; *see also Valley Forge*, 454 U.S. at 473, 102 S. Ct. 752 ("The federal courts have abjured appeals to their authority which would convert the judicial process into 'no more than a vehicle for the vindication of the value interests of concerned bystanders.' ") (quoting *United States v. SCRAP*, 412 U.S. 669, 687, 93 S. Ct. 2405, 37 L. Ed. 2d 254 (1973)).

[14] 406 U.S. 416, 92 S. Ct. 1678, 32 L. Ed. 2d 195 (1972).

[15] *Id.* at 420, 92 S. Ct. at 1681.

statutory power accorded the bankruptcy trustee to sue on behalf of third parties; the Court found no suggestion in the language of the Bankruptcy Code that a bankruptcy trustee was to have such a responsibility.[16] Instead, the Court reiterated that a trustee in bankruptcy stands in the shoes of an insolvent corporation, and emphasized the distinction between suits on behalf of the corporation and third parties.[17]

Second, the Court was concerned that, as a practical matter, a recovery by the trustee on behalf of the debenture holders would not really add to the assets of the estate.[18] If, as appeared to be the case, Webb & Knapp was *in pari delicto* with Marine Trust, Marine Trust could turn right around and assert a claim against Webb & Knapp in subrogation to the claims of the policyholders to apportion the loss between them.[19] And apart from the potential problem of subrogation, a suit by the trustee to recover for the debenture holders would significantly complicate the process of establishing damages:

> Each creditor, including the debenture-holders, can prove the full amount of his claim, and only to the extent that a debenture-holder fails to satisfy it from the bankruptcy estate will he suffer a loss which he can assert against the

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[16] *Id.* at 428, 92 S. Ct. at 1685.

[17] *Id.* at 429, 92 S. Ct. at 1685 (*citing McCandless v. Furlaud*, 296 U.S. 140, 80 L. Ed. 121, 56 S. Ct. 41 (1935)).

[18] *Id.* at 429-30, 92 S. Ct. at 1686.

[19] *Id.* at 430, 92 S. Ct. at 1686.

> defendant through its failure to enforce the negative convenants.[20]

In other words, a suit by the trustee on the debenture holders' behalf put the cart before the horse; the trustee could not measure damages suffered by the debenture holders until those creditors had brought their claims against the estate, and the shortfall in available estate assets to pay those claims became clear.[21]

Third, the Court found problematic the possibility that a suit by the trustee would conflict with independent actions the debenture holders might want to bring on their own behalf, and might not bind third-party claimants seeking to proceed separately.[22] Conflicts could arise between the trustee and the debenture holders if the trustee chose to settle for less than what holders thought their claims were worth, or if the debenture holders began to inexpensively settle their individual claims out of court, thus undercutting the trustee-led action. The Court found that, unlike the Federal Rule governing class actions, the Bankruptcy Code was not designed to handle such problems.[23] Conflict of interest problems are not merely prudential, but directly relate to Article III standing principles, which "reflect[ ] a due regard for the

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[20] *Id.* at 431, 92 S. Ct. at 1686 (*quoting Clarke v. Chase Nat'l Bank*, 137 F.2d 797, 800 (2d Cir. 1943)).

[21] While the *Caplin* Court did not distinguish between "prudential" and "constitutional" standing considerations, complications in measuring damages appear to be prudential concerns.

[22] *Id.* at 431-32, 92 S. Ct. at 1686.

[23] *Id.* at 433-34, 92 S. Ct. at 1688.

autonomy of those persons likely to be most directly affected by a judicial order."[24]

In the present case, the Florida liquidator seeks to recover $5.4 million or other damages from Chase on a variety of theories. Among these theories are the claims that Chase defrauded individual policyholders by representing that Western Star had a $5.4 million CD on deposit with Chase, and breached fiduciary duties to the policyholders. The breaches of duty under these theories were to policyholders, not Western Star. The policyholders experienced injury because they were tricked into buying insurance policies from an insolvent company that is now unable to pay insurance claims, or because Chase, as trustee, mishandled trust assets or breached other duties it owed as trustee.[25] The Florida Insurance Commissioner, as receiver for the Western Star estate, does not have standing in federal court to bring these claims on behalf of policyholders.

If recovery is sought for injury suffered by individual policyholders, the Florida receiver has standing in federal

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[24] *Valley Forge*, 454 U.S. at 473, 102 S. Ct. at 759; *see also Fleming v. Lind-Waldock & Co.*, 922 F.2d 20, 25 (1st Cir. 1990) (holding that an equity receiver of an investment company lacked standing to bring claims on behalf of third parties, in part because of conflicts that could arise).

[25] Whether Western Star alone, or both the policyholders and Western Star are the beneficiaries of the trust is an issue neither party has briefed. Florida does not have standing to raise individual policyholder claims for breach of trust or fiduciary duty. Whether Chase breached trust or fiduciary duties to Western Star is discussed below.

court only if it is a representative of the injured policyholders. In the present case, there are no facts to support any recognized theory of representation. There is no indication in the record that the policyholders have assigned their fraud claims to Western Star or the Florida receiver. Similarly, there is no evidence that policyholders have designated the Florida receiver as their agent.

Furthermore, as in *Caplin*, which dealt with the Bankruptcy Code, the relevant statute in this case, Florida's Insurer Rehabilitation and Liquidation Act, does not designate the Florida receiver as any third party's representative. The insurance liquidation acts of some states do expressly authorize insurance receivers to take up certain policyholder claims, or have been interpreted by state courts to allow such action.[26] However, Florida's statute provides only that "an order to liquidate the business of a domestic insurer shall direct the department forthwith to take immediate possession of the *property of the insurer*, to marshal all the *assets of the insurer* . . . and to give notice to all creditors who may have claims against the insurer

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[26] *See, e.g., Four Star Ins. Agency, Inc. v. Hawaiian Elec. Indus., Inc.* 89 Hawai'i 427, 974 P.2d 1017, 1022 (1999); *Arthur Andersen LLP v. Superior Court*, 67 Cal.App.4th 1481, 1487 n. 3, 1495, 79 Cal.Rptr.2d 879 (1998) (defining auditor's incorrect valuation as breach of duty to insurance commissioner, who could recover damages sustained by policyholders for their benefit); *Merin v. Yegen Holdings Corp.*, 573 A.2d 928, 940 (1990) (holding that under New Jersey law, the liquidator could conduct a "class action type" proceeding on behalf of policyholders claiming fraud against the insurer's auditor). The Court notes that the majority of cases allowing a receiver to proceed on behalf of third parties are state court cases. *Article III*'s "case or controversy" limitation is not binding on state courts.

to present such claims. . . . "[27] A fraud or breach of trust action accruing to a policyholder cannot be described as "property" or an "asset" of Western Star.

Florida courts have not interpreted the insurance receivership laws as authorizing receivers to act in a representative capacity on behalf of anyone other than the insolvent insurer. One Florida court has held that as a successor in interest of the insolvent insurer, an insurance receiver may only bring causes of action that the insurer could have brought.[28] The Florida Supreme Court has explained in the context of equitable receiverships, " 'a receiver takes the rights, causes and remedies which were in the corporation, individual or estate whose receiver he is, or which were available to those whose interests he was appointed to represent. A receiver has no right to property which does not belong to the individual or corporation over which he was appointed.' "[29] Assuming that Florida *could* designate its Insurance Commissioner as the automatic representative of policyholders in the

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[27] Fla. Stat. Ann. § 631.111(1) (1996) (emphasis added).

[28] *Florida Dep't of Ins. v. Blackburn*, 633 So.2d 521, 524 (Fla.Dist.Ct.App.1994) ("As a successor, the receiver can only bring causes of action that were possessed by the corporation placed in receivership."); *see also Schacht v. Brown*, 711 F.2d 1343, 1346 n. 3 (7th Cir.1983) (casting doubt in dicta on a receiver's standing to bring suit on behalf of third parties under a similar Illinois statute).

[29] *Hamilton v. Flowers*, 134 Fla. 328, 183 So. 811, 817 (1938) (*quoting* 53 C.J. 99, 324).

prosecution of their fraud and breach of trust claims, it has not evidenced an intent to do so.[30]

Policy considerations of the sort at issue in *Caplin* lend further support to the above interpretation of Florida's Insurance Liquidation Statute.[31] In *Caplin*, the Court noted the likelihood of conflicts of interest between the trustee in bankruptcy and the debenture holders. In the present case, such conflicts are unlikely to emerge if, as the parties state, the California policyholders have already missed their window under the statute of limitations to sue on their own. However, an interpretation of Florida law as authorizing receiver suits on behalf of third parties might apply equally to future cases in which individual policyholders might want to act autonomously, and in which legal and strategic preferences of policyholders and the receiver diverge.

Also, as in *Caplin*, unless and until individual policyholders have established the amount of money that they are owed for insurance claims by bringing claims against the receivership and the amount of the shortfall is established, it is unclear how a fraud or breach of fiduciary duty suit against Chase on behalf of the policyholders

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[30] Where a receiver has effectively appropriated policyholder claims, and any recovery is applied in part to the estate's administrative claims, due process might well be implicated.

[31] If the Florida courts were, on similar facts, to read the Florida statute as authorizing the type of representational standing the Receiver seeks to exercise in this case, the policy considerations in *Caplin* might nevertheless provide a prudential basis for rejecting Receiver standing to assert policyholder claims in federal court.

could establish policyholder damages. Indeed, the Florida receiver overtly endorses a "pay first, establish damages later" approach, demanding $5.4 million from Chase up front, to be used for any and all purposes under the Liquidation Act priority scheme, including payment of administrative claims first.[32] Not only might a flat $5.4 million recovery be incommensurate with actual damages, but conceivably any such recovery could go entirely to the cost of estate administration, with little remaining to compensate injuries suffered by those on whose behalf these claims are ostensibly brought.

Florida lacks direct standing to bring claims to recover for injuries that are not its own or Western Star's, and does not have representational standing to proceed on behalf of the policyholders.

B. Western Star's Claims

If the receiver may not assert the individual claims of the policyholders, then it may proceed to trial only on causes of action resting on breaches of duty to Western Star itself. The receiver has asserted several claims of this sort. The question is under what theory, if any, and to

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[32] Florida's Insurer Insolvency, Rehabilitation and Liquidation Act establishes a priority scheme for payment of claims, similar to the Bankruptcy Code. All claims in one class must be paid before any claims lower in the priority line. If insufficient funds exist to pay a class in full, a pro rata distribution is made. In order of priority, the classes include: (1) administrative claims; (2) losses covered by insurance policies; (3) premium refunds; (4) federal government claims; (5) debts to insurance company employees; (6) general creditors. Fla. Stat. Ann. § 631.271 (1996).

what extent, Western Star's estate may recover from Chase for its acceptance of Western Star's dummy CD. Though Florida has standing to assert these claims, the district court properly granted summary judgment on them.

1. Loss of Trust Assets

Florida alleges that Chase wrongfully lost $5.4 million of trust assets and that it is, as trustee, subject to the remedy of restoring the lost assets, both at common law and under the terms of the trust agreement. Under this theory, Chase is liable for $5.4 million, the amount of the loss. This theory is not grounded in reality. Florida demands that Chase hand over $5.4 million in cash instead of the worthless piece of paper that Western Star used to settle the trust. There never was $5.4 million, except, perhaps, in the mind's eye of some creative bankers. As the district court observed, the start and end value of the trust was $0.00.

Similarly, Florida's heavy emphasis on paragraph 4.4 of the trust agreement, which provides that the Trustee must, in the event of insolvency, transfer all trust assets to the receiver, is misplaced. The district court correctly noted that paragraph 4.4 is a turnover provision, not a liquidated damages provision. Chase has already turned over the CD, which was the sole, worthless asset held "in trust." These observations do not necessarily excuse Chase from wrongdoing; rather, they simply illustrate that "loss of trust assets" and failure to comply with the trust agreement's turnover provision are not useful ways to conceptualize the wrong.

In its reply brief, Florida argues for the first time in this appeal that Chase is estopped from denying that it held assets worth $5.4 million. Under Texas law, "[e]stoppel involves the reasonable reliance of one party on the conduct or statements of another party. If the relying party suffers harm as a result of its reliance, the law estops the other party from disavowing its earlier conduct or statements."[33] Florida's argument appears to be that Chase is estopped, in defending against Florida's causes of action, from making the factually correct statement that the $5.4 million never existed. Whatever Florida's estoppel position is, Florida's own summary judgment brief noted, "a party invoking estoppel must be ignorant of the facts which the party to be estopped is alleged to have represented by his conduct or silence."[34] Florida has never responded to Chase's argument that Western Star knew full well that the CD was worthless, and so could not have relied on any representations Chase made to the contrary.[35]

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[33] *Matador Petroleum Corp. v. St. Paul Surplus Lines Ins. Co.*, 174 F.3d 653, 660 (5th Cir.1999).

[34] *Meyers v. Moody*, 693 F.2d 1196, 1208 (5th Cir.1982) (citations omitted).

[35] *Wheeler v. American Nat'l Bank of Beaumont*, 162 Tex. 502, 347 S.W.2d 918 (1961), cited by Florida in its reply brief, is distinguishable. In that case, the receiver sued officers and employees of the insolvent insurer together with banks who had misrepresented the value of the loans. *Id.* at 919. The receiver thus placed all wrongdoing on parties other than the insurance company, on whose behalf the receiver was suing. In contrast, Florida has not explained why knowledge of the fraudulent CD valuation should not be imputed to Western Star itself. Florida's Complaint describes conduct perpetrated by "Western Star," thus eliminating any possibility of reliance.

2. Improper Certification of Trust Assets

Florida argues that Chase breached a duty to Western Star by not compelling it to place assets valued at the trust fund minimum into the account. Florida states, "during the entire time, the Trustee never rejected the CD or valued the Trust at less than $5.4 million. Consequently, the Trustee never demanded other collateral. The Trustee never should have executed the Trust Agreement and promulgated the express representation of value as $5.4 million until after it had received and accepted qualified assets." This argument fails for two reasons.

First, in a deviation from standard NAIC trust language, the terms of the trust agreement provide that Chase did not have a duty to certify the value of the trust assets to the National Association of Insurer Information Office. Paragraph 2.13 of the agreement between them provided that "the Trustee shall be under no duty or obligation to require the Company to make any transfers or payments of additional assets to the Trust and it shall be conclusively presumed that any and all such transfers or payments to Trustee have been properly made." Under Texas law, the settlor of a trust "may relieve the trustee of a duty, liability, or restriction imposed by this subtitle,"[36] and the parties agreed in the trust instrument that Chase would have no duties or responsibilities not expressly provided for in the trust language. Accordingly, Chase did not have a duty to compel Western Star to deposit additional assets.

[36] Tex. Prop. Code § 113.059.

Second, Florida has not supplied a valid measure of damages under its "breach of duty to value assets" theory. Even if Chase did have a duty to Western Star to value assets, Florida assumes, without any explanation, that the measure of damages is $5.4 million. There is no reason that $5.4 million, an amount of money that never existed except in ink on the face of a piece of paper, bears any connection to anyone's actual damages.

The measure of damages under this theory is at best the amount of money Chase could have successfully compelled Western Star to place into the trust for the benefit of Western Star and its estate in the event of insolvency. Western Star was already insolvent in 1993 when the trust was established, and at all times thereafter. As the Fifth Circuit has previously held, "a 'trustee is not liable for a loss resulting from the breach of trust if the same loss would have been incurred if he had committed no breach of trust.' "[37]

There is no evidence that Western Star ever had any net assets it could have used to fund the trust. Florida argues that because Western Star took in upwards of $6 million in premium payments after the trust was established, Chase could have compelled payment of the $5.4 million. Evidence of income in the form of premium

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[37] *Whitfield v. Lindemann*, 853 F.2d 1298, 1304 (5th Cir.1988) (*quoting* Restatement (Second) of Trusts § 212 cmt. e, in the context of ERISA trust law); *see also Craft v. Sunwest Bank of Albuquerque*, 84 F.Supp.2d 1226, 1240-41 (D.N.M.1999) (suggesting in dicta that a trustee who fails to compel the settlor to deposit sufficient assets into a trust cannot be liable for more than the assets that would have been available to fund the trust).

payments does not establish the amount of assets that Western Star had available at any given time.

3. Misrepresentation/Fraud

The district court properly granted summary judgment against Florida's claim that Western Star itself had been the victim of Chase's fraud or misrepresentation. Under Texas law, reliance is an element of fraud or misrepresentation,[38] and Florida concedes that Western Star did not rely on Chase's representation that the CD was worth $5.4 million. Florida's opening brief on appeal does not explicitly identify fraud on Western Star (as opposed to the policyholders) as an issue on appeal, although there is scattered language suggesting an attempt to pursue this theory. However, Florida has not raised any argument as to how it might bring a fraud action for injury inflicted on Western Star without proving reliance.[39] Florida's reliance arguments relate to fraud claims brought on behalf of the policyholders, not Western Star.

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[38] *F.D.I.C. v. Patel*, 46 F.3d 482, 486-87 (5th Cir.1995) (*citing Sears Roebuck & Co. v. Meadows*, 877 S.W.2d 281, 282 (Tex.1994)).

[39] Florida does not argue, for example, that Western Star could have pursued a fraud claim against Chase because the knowledge of its officers and directors should not be imputed to the corporate entity itself, *F.D.I.C. v. Ernst & Young*, 967 F.2d 166, 170-71 (5th Cir.1992) ("In Texas, whether an employee's fraud is attributable to a corporation depends on whether the fraud was on behalf of the corporation or against it. . . . "), or that any such imputed knowledge should not carry over to the receiver asserting claims on behalf of the estate. *See F.D.I.C. v. O'Melveny & Myers*, 61 F.3d 17, 19 (9th Cir.1995).

4. Deepening Insolvency

Florida argues that by certifying the trust assets at $5.4 million, Chase caused the life of Western Star to be artificially prolonged, causing it fall deeper into debt as it issued more policies on which it could not pay claims. Florida says, "if the Trustee had not executed the Trust Agreement to enable Western Star to market policies in California, there would not have been millions collected in premiums and millions owed on claims and, of course, no lawsuit by the Receiver on the Trust."

There is a trend toward recognizing "deepening insolvency" as a cause of action against a party who creates the false appearance of solvency in an insurance company or other financial institution.[40] As a result of this deception, regulatory authorities allow the company to keep operating, and do not place it into receivership in a timely fashion. Damages are measured by the dissipation of assets or increased debt load occurring after the false representation of solvency was made. Some courts have suggested that the receiver may only bring such an action on behalf of the insolvent company when individual officers of the insolvent company engaged in such activity with an outside party to keep the business open

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[40] *Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co., Inc.*, 267 F.3d 340, 349-52 (3d Cir.2001) (holding that Pennsylvania's Supreme Court would recognize a "deepening insolvency" cause of action); *see also Corcoran v. Frank B. Hall & Co., Inc.*, 149 A.D.2d 165, 175-76, 545 N.Y.S.2d 278 (1989).

for the purposes of looting its assets, rather than benefitting the company.[41]

In any event, Florida does not point to any caselaw in support of this theory, and mentions it only in passing. There do not appear to be any reported Texas cases recognizing "deepening insolvency." Ultimately, the Court need not decide whether the Texas Supreme Court would recognize this theory as an independent cause of action. Even if it would, Florida has made no attempt, either in its summary judgment briefing and evidence in the district court, or in its brief on appeal, to quantify how much additional debt, if any, Western Star incurred after Chase assisted in establishing the empty trust. To the extent that Florida has adequately briefed deepening insolvency as a viable legal theory, there is no evidence of damages measured from the "deepening insolvency" perspective that would justify allowing Florida to proceed to trial on this claim.

Finally, the Court addresses the concern of both the Florida receiver and the District Court that "[m]any wrongs but no rights is not the hallmark of either Texas or Florida jurisprudence." Our holding today does not demonstrate the absence of a remedy in this type of case. Without expressing an opinion on the merits of any particular option, policyholders might bring a class action to attempt fraud or breach of fiduciary duty claims against a NAIC trustee; the California Insurance Commissioner,

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[41] *See Schacht*, 711 F.2d at 1350; *see also In re Latin Inv. Corp.*, 168 B.R. 1, 5 (Bankr.D.C.1993) (discussing a bankruptcy trustee's standing to sue a third party who worked with insolvent company's principals in misusing corporate funds).

who the California Supreme Court has held to be a representative of California policyholders,[42] might bring such claims on their behalf; a receiver in Florida's position might prevail on a deepening insolvency theory or recover from officers and directors of the insurance company; or an insurance commissioner might sue the trustee for contribution if the insurance company and trustee acted as joint tortfeasors and applicable state law allows. In the present case, however, the correct combination of legal theories, proper plaintiffs, and evidence on damages is not present.

CONCLUSION

Western Star was not the victim of any tort for which it has both identified a duty that was breached, and supplied adequate summary judgment evidence on the existence of damages. With respect to injuries sustained by the policyholders, neither Western Star nor the Florida receiver is an assignee of policyholder claims, or an agent to represent their interests. To the extent that Florida *could* statutorily designate its insurance commissioner as an agent of California policyholders to prosecute claims on their behalf, it has not evidenced an intent to do so. The Florida receiver lacks standing in federal court to bring claims predicated on a breach of duty and injury to the policyholders.

AFFIRMED.

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[42] *See Arthur Andersen*, 67 Cal.App.4th at 1495, 79 Cal.Rptr.2d 879.

APPENDIX B

United States District Court, N.D. Texas, Dallas Division.

FLORIDA DEPARTMENT OF INSURANCE, as Receiver of Western Star Insurance Company, Ltd., Plaintiff,

v.

CHASE BANK OF TEXAS NATIONAL ASSOCIATION f/k/a TEXAS COMMERCE BANK NATIONAL ASSOCIATION f/k/a AMERITRUST OF TEXAS NATIONAL ASSOCIATION, Defendant.

No. CIV.A.3:99CV1254G.

Jan. 14, 2000.

MEMORANDUM ORDER

FISH, District J.

Before the court is the motion of the defendant Chase Bank of Texas National Association f/k/a Texas Commerce Bank National Association f/k/a Ameritrust of Texas National Association ("Chase") to dismiss, pursuant to F.R. CIV. P. 12(b)(6), the complaint of the plaintiff Florida Department of Insurance, as Receiver of Western Star Insurance Company, Ltd. (the "Receiver"). For the following reasons, Chase's motion is denied.

I. BACKGROUND

The facts of this case have already been set out, in large part, in *Texas Commerce Bank National Association v. State of Florida*, 138 F.3d 179 (5th Cir. 1998). Also, this court has already had several occasions to issue orders relating to these parties.[1] Nevertheless, the court will

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[1] *See, e.g.*, Agreed Order Granting Interpleader and Declaratory Judgment of May 23, 1994, attached as Exhibit A to

repeat the salient facts for the purpose of resolving this motion.

On June 14, 1994, the Receiver was appointed to control the remaining assets of the insolvent Western Star Insurance Company ("Western Star"), an Antigua corporation, that was *de facto* domiciled in the State of Florida and illegally conducting insurance business from Florida using Broadview Services, Inc. ("Broadview"), a Florida corporation, as a cover. Complaint ¶ 2; also Consent Order Appointing the Florida Department of Insurance as Receiver for Purposes of Liquidation, Injunction, and Notice of Automatic Stay ("Consent Order") ¶¶ A-H, attached as Exhibit 1 to Complaint. Before being placed into receivership, Western Star was marketing insurance policies in the United States as an "alien surplus lines

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Defendant's Motion to Dismiss, and Brief ("Motion"); Order of Dismissal Of May 24, 1994, attached as Exhibit B to Motion; *Texas Commerce Bank National Association v. Florida*, No. 3:96-CV-2814-G, 1997 WL 181532, at *1 (N.D. Tex. Apr. 9, 1997), attached as Exhibit C to Motion (denying Chase's motion for a preliminary injunction), *aff'd, Texas Commerce Bank National Association v. State of Florida*, 138 F.3d 179 (5th Cir. 1998). The Receiver's cause of action has also been dismissed once before for lack of personal jurisdiction in the Northern District of Florida. *See* Order Dismissing Case for Lack of Personal Jurisdiction, attached as Exhibit D to Motion. Succinctly stated, Chase's original interpleader and declaratory judgment action, which it filed previously in this court, sought (1) a declaration that its duties as trustee had concluded as of September 4, 1993, and (2) the deposit of the Certificate of Deposit at issue here into the registry of the court, but it "did not 'actually litigate' anything regarding the trust assets given the [subsequent] dismissal of the interpleader action as moot." *Texas Commerce Bank*, 138 F.3d at 182.

insurer." Complaint ¶ 4. To continue the sale of policies and the collection of premiums for policies primarily sold in California both by Western Star and a predecessor in interest, Kyle Insurance Company, Western Star needed to be able to demonstrate to insurance regulators sufficient, valid, and legal reserves for its underwriting. *Id.* Specifically, to protect policyholders, claimants, and the public, the State of California required a reserve of $5.4 million in cash or equivalent funds. *Id.* The basis of this suit is Chase's[2] allegedly false representation that it was holding a $5.4 million Trust Fund in its "actual and sole possession" to enable Western Star to sell new policies and keep existing policies in force. *Id.* ¶ 5.

The Receiver alleges that, commencing in late 1992 and early 1993, Western Star sought the assistance of Chase for a joint plan to conceal the true financial condition of Western Star and to allow the insurance company to continue to sell policies and collect premiums without real reserves. *Id.* ¶ 7. To implement this plan, Western Star had arranged, in a December 1992 meeting held in Miami, Florida with the representative of a foreign entity, Europe American Capital Corporation ("EACC"), to "rent" a Certificate of Deposit ("CD"). *Id.* The CD stated that Western Star had "lodged a deposit" in the amount of $5.4 million in "United States Dollars" with the First Asia Development Bank, Ltd., Port Vila, Republic of Vanuatu, an island republic in the South Pacific between Australia and Tahiti. *Id.; also* Certificate of Deposit,

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[2] For the sake of simplicity, "Chase" will be used to refer not only to the present defendant but also to the predecessor entities which engaged in these activities.

attached as Exhibit 3 to Complaint. The First Asia Development Bank, Ltd. ("First Asia") was a private unregulated bank. Complaint ¶ 7. Florida alleges that Western Star neither deposited $5.4 million with First Asia nor even had $5.4 million in cash to deposit. *Id.* Instead, Western Star allegedly paid a fee of several thousand dollars to EACC for a "credit enhancement," and the CD obtained by this arrangement falsely stated on its face that Western Star had deposited $5.4 million in United States Dollars in the First Asia Development Bank. *Id.*

After obtaining this "rented" CD, Western Star in January 1993 met with Chase in Dallas, Texas for the purpose of securing its agreement to act as trustee for Western Star in this insurance venture. Complaint ¶ 8. Chase furnished Western Star a copy, partially blacked out, of what purportedly was a "National Association of Insurance Commissioners ('NAIC') Standard Form Trust Agreement for Alien Surplus Lines Insurers."[3] *Id.* Chase

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[3] The NAIC had promulgated a "standard form" trust agreement for the express purpose of protecting policyholders, claimants, and the public. This Trust provided a secure sum of liquid reserve assets in the actual and sole possession of a domestic United States bank trustee as a source of payment in the event of the refusal or inability of the offshore surplus lines insurance company to pay claims. This special purpose NAIC Trust, in conjunction with various uniform laws and reciprocal interstate agreements, would enable an offshore insurance company to be qualified to write alien surplus line coverage. Complaint ¶ 9.

Chase modified the actual "Standard Form" Trust Agreement as promulgated by NAIC that Chase used for both the Western Star and the Alpine Trust Agreements. Chase deleted the provision in paragraph 2.14 requiring Chase, as Trustee, to certify upon

had used the form for another offshore insurance company, Alpine Assurance, Ltd., Turks and Caicos Islands, which also allegedly had sought to inflate its balance sheet and market surplus lines coverage in the United States. *Id.* Surplus lines coverage was generally regarded as high risk coverage – insuring boats, taxi cabs, and other persons or entities seeking coverage that may not have been available through standard domestic insurance companies. *Id.*

Under the terms of the Trust, fiduciary duty required Chase, as Trustee, to have in its actual and sole possession a $5.4 million Trust Fund for the protection of policyholders and Third Party claimants. Complaint ¶ 13. According to the Agreement:

> 1.5 *"TRUST FUND"* or *"TRUST"* means the cash, Readily Marketable Securities and Letters of Credit, or any combination thereof, in the actual and sole possession of the Trustee and held under the provisions of this Agreement

NAIC Standard Form *Trust Agreement for Alien Surplus Line Insurers* at 2, ¶ 1.5 ("Agreement"), attached as Exhibit 2 to Complaint.

The Receiver alleges that Chase was aware, or should have been aware, that Western Star planned to use the First Asia CD as its trust asset, and that this was not an acceptable trust asset as defined by the NAIC Trust

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execution of the trust agreement all trusteed assets to the NAIIO (National Association Insurer Information Office). Chase also deleted the requirement in paragraph 5.3 to obtain authority and approval from the NAIC to modify the "Standard Form" Trust Agreement. Complaint ¶ 10 n. 1.

Agreement. Complaint ¶¶ 14, 16. Chase continued to represent that it maintained a $5.4 million Trust Fund in its "actual and sole possession," and Western Star continued to sell and collect premiums of up to a million dollars a month from California on new policies being written by Western Star. Complaint ¶¶ 15-25. According to the Receiver, Chase continued to represent that this CD had value even after the California Department of Insurance, the Office of the Comptroller of Currency, the Texas Department of Insurance, and the Receiver became increasingly concerned that Western Star was writing insurance policies without any assets in its trust fund. *Id.* ¶¶ 26-34. At no time while Chase was Trustee did it declare the Trust Fund insolvent or disavow in any respect the Trust or the allegedly facially false CD. *Id.* ¶¶ 23, 28. As a result, Western Star collected substantial premiums, but left policyholders, third party claimants and other creditors with no assets to cover approximately $8 million in outstanding claims. *Id.* ¶ 25. Chase eventually interpled the allegedly worthless First Asia CD in the registry of this court, and there followed the procedural wrangling described in *Texas Commerce Bank*, 138 F.3d 179.[4]

The Receiver now brings this action, seeking monetary relief from Chase, on the ground that Chase's representation constitutes a fiduciary's commitment to the Receiver for $5.4 million. Complaint ¶ 42. The Receiver

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[4] At some point after the interpleader, Western Star's counsel advised the court that the First Asia Development Bank had cancelled the CD and had "disappeared" from the Island Republic of Vanuatu. Complaint ¶ 37.

makes claims against Chase for, among other things, gross negligence and willful misconduct concerning its breach of the Trust Agreement, breach of fiduciary duty, and fraudulent concealment of Western Star's insolvency. Complaint ¶¶ 46-54. Chase has responded with this motion, in which it primarily challenges the Receiver's and the insureds' standing to pursue these claims.

II. ANALYSIS

A. *Standard for Dismissal under Rule 12(b)(6)*

Federal Rule of Civil Procedure 12(b)(6) authorizes dismissal of a complaint for "failure to state a claim upon which relief can be granted." However, a motion under Rule 12(b)(6) should be granted only if it appears beyond doubt that the plaintiff could prove no set of facts in support of its claim that would entitle it to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Leffall v. Dallas Independent School District*, 28 F.3d 521, 524 (5th Cir. 1994); see also *Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982) (citing WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: Civil § 1357 at 598 (1969), for the proposition that "the motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted"), *cert. denied*, 459 U.S. 1105 (1983).

In determining whether dismissal should be granted, the court must accept all well-pleaded facts as true and view them in the light most favorable to the plaintiff. *Capital Parks, Inc. v. Southeastern Advertising and Sales System, Inc.*, 30 F.3d 627, 629 (5th Cir. 1994); *Norman v. Apache Corporation*, 19 F.3d 1017, 1021 (5th Cir. 1994);

Chrissy F. by Medley v. Mississippi Department of Public Welfare, 925 F.2d 844, 846 (5th Cir. 1991).

B. *Choice of Law*

Because the Receiver is both the domiciliary receiver under Florida law and the court-appointed "designated receiver" under the NAIC trust, the standing issues are governed by supplemental and complementary legal considerations. The rights, duties, and obligations of the court-appointed receiver under the NAIC Trust Agreement, as well as the rights, duties, and liabilities of Chase as trustee under the NAIC Trust, are governed by the trust agreement and fiduciary laws of Texas. *See* Agreement at 14, ¶ 5.1 ("This Agreement shall be governed by, and construed and enforced in accordance with, the laws of the State of Texas."). The rights, duties and obligations of the court-appointed domiciliary receiver of Western Star are governed by the laws of Florida. See *Meyers v. Moody*, 693 F.2d 1196, 1205-06 (5th Cir. 1982) ("The capacity of a receiver to sue in federal court is governed by the law of the forum state. . . . The receiver in this case- . . . derived his authority not from the decrees of the appointive court but from the laws of the appointive state."), *cert. denied*, 464 U.S. 920 (1983). This court will focus primarily on Texas law, as this gives a clear picture of both the Receiver's rights and Chase's duties under the Agreement.

C. *Standing of the Receiver*

Chase argues that – even assuming the truth of the Receiver's factual allegations – the Receiver does not, as a

matter of law, have standing to sue for alleged wrongs committed against Western Star's policyholders and creditors as opposed to wrongs committed against Western Star itself. Motion at 2. Chase contends that those are claims that only the policyholders and creditors themselves can bring, but not the Receiver, which "stands in the shoes" of Western Star. *Id.* According to Chase, if Western Star's policyholders and creditors have been injured by actionable misconduct of Chase, then it is for those policyholders and creditors, and not the Receiver, to decide "if, when, where, and under what theories to sue." *Id.*

Chase relies on *Cotten v. Republic National Bank of Dallas*, 395 S.W.2d 930, 941 (Tex. Civ. App. – Dallas 1965, writ ref'd n.r.e.), in support of its argument. In *Cotten*, the court wrote:

> Certainly a receiver for an insolvent insurance corporation such as ICT has a right to maintain a suit which is necessary to preserve the corporation's assets and to recover assets of which the corporation has been wrongfully deprived through fraud. In such a suit the receiver may be said to sue as the representative of the corporation and its creditors, stockholders and policyholders, for they have an interest in the corporation's assets and upon liquidation they are entitled to a proper distribution of the assets.
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> But some actions for fraud are by their nature personal to each creditor, or each stockholder, or each policyholder, and the receiver may not then maintain a suit in his representative capacity for their joint benefit. In such case each claimant and he alone may bring and maintain

> the suit himself, for the action is personal, separate and several, not joint, and extends no further than the individual loss of each particular creditor who sues. For example, one who proves that he relied on false representations as to the corporation's financial condition and was thereby induced to extend credit to the corporation, or to purchase stock in it, or to take out an insurance policy with it, must in his own name maintain a separate suit for his damages against the person who uttered the fraudulent representations. The aggrieved party and he alone may maintain the suit. Even then a creditor, stockholder, or policyholder who did not know or rely on such false representation, or was not induced by it to extend credit or invest his money cannot recover for the alleged fraud. The receiver has no right to bring or maintain such a suit.
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> We therefore hold that in this case the Receiver represents the creditors, stockholders and policyholders and may sue the Bank for its alleged fraud for their benefit only to the extent that his cause of action seeks to preserve or recover the assets of ICT. He may not maintain a suit as representative of any individual creditor, stockholder, or policyholder who may claim that he was induced by the alleged false representations of the Bank to extend credit or invest his money in ICT and thereby sustained damage individually because of said alleged false representations.

Cotten, 395 S.W.2d at 941.

In response, the Receiver directs the court to the decision of *J.D. Wheeler v. American National Bank of Beaumont*, 347 S.W.2d 918 (Tex. 1961). In *J.D. Wheeler*, the Texas Supreme Court held that an insurance company's receiver could maintain a cause of action, on behalf of the creditors, policyholders, and claimants of the institution in receivership, against the American National Bank for having knowingly misrepresented the financial condition of the institution in receivership, as reflected by the bank records. *Id.* at 921. The plaintiff's case, as described in the court's opinion, is very similar to the Receiver's theory of recovery here:

> The alternative pleadings, in effect, allege that the furnishing of money to be deposited in the bank and the certification by the banks that Texas Mutual [the institution in receivership] had at certain specific times money on deposit with them, and the arrangement between the management of Texas Mutual and the banks was such that the money was loaned to Texas Mutual under circumstances whereby it could not be removed from the bank without the signature or approval of the bank itself and its officers, were false and that the making of such false certificates was for the purpose of leaving the impression with the Insurance Commission that the Texas Mutual was in better financial condition than the true facts would reflect.

Id. at 920.

Wheeler also cited with approval the language in *McTamany v. Day*, 128 P. 563, 565 (Idaho 1912), that "[i]n case of a recovery on all or either of said grounds [(1) the

illegal payment of dividends; (2) the making and publication of false reports; (3) the unlawful permitting of excessive loans; (4) that the plaintiff made deposits in the bank while it was insolvent under circumstances whereby the defendants could have known of the insolvency of the bank had they exercised proper diligence], the amount recovered is an asset of the bank, and in that case any action brought to recover the same should be by the receiver." *Wheeler*, 347 S.W.2d at 924. The *Wheeler* court concluded that "[u]ndoubtedly, the result reached in the *McTamany* case was correct," and that the insurance company receiver could maintain an action against the banks which had fraudulently entered into fictitious loan transactions with the institution in receivership so that company officers could represent the company to have the legally required surplus. *Id.* at 924-5.

The Receiver here argues, and the court agrees, that this case is more like *Wheeler* than *Cotten*. "There is a significant distinction between pursuing a claim of negligent misrepresentation on behalf of the liquidation estate versus pursuing the idiosyncratic claims of numerous policyholders." *Arthur Andersen LLP v. Superior Court*, 67 Cal. App. 4th 1481, 1497, 79 Cal. Rptr. 2d 879, 889-90 (Cal. App. 2 Dist. 1998) (review denied 1999). Here, no policyholder or claimant has a particularized claim of fraud against Chase. *See* Receiver's Response to Chase Bank's Motion to Dismiss and Memorandum in Support ("Response") at 16. The injury that each suffers is the same as all others: no monies available to pay their claims. While certainly the particular dollar amount of each claim will vary, there is nothing peculiar to any

policyholder or claimant about the character of his damages.

Like the receiver in *Wheeler*, the Receiver is here making allegations that Chase's misrepresentations injured the estate of the insolvent insurer and its ability to pay claims. The Receiver is not suing on behalf of any individual or group of policyholders who claim that they were injured through their reliance on Chase's fraudulent misrepresentations; it is suing for the benefit of all of those policyholders to recover the assets of Western Star so that there will be something in the estate with which to pay the insureds as their claims come due. The Receiver's claim is like the receiver's claim in *Wheeler*, as the following excerpt demonstrates:

> The pleadings in the present case present a situation where the banks involved herein . . . aided the officers and directors of Texas as [sic] Mutual in creating fictitious assets in order that such officers and directors could represent to the Insurance Commissioners of Texas and other states that it had the capital and surplus required by law to do business. The banks herein . . . further represented to the Board, or its examiner, that such assets were the absolute assets of the Texas Mutual.

347 S.W.2d at 923.

The conclusion that the Receiver has standing to sue in this case also finds support in the recent decision of *Craft v. Sunwest Bank of Albuquerque, N.A.*, No. 98-0966 BB/DJS (D.N.M. Nov. 17, 1999), attached as Exhibit A to Plaintiff's Unopposed Motion for Leave to File Supplemental Authority. In that case, Meadowlark Insurance

Company ("Meadowlark") was an offshore insurer desiring to sell surplus lines of insurance in the United States. *Craft* at 1. Toward that end, Meadowlark's management contacted Sunwest Bank ("Sunwest") to set up a trust fund. *Id.* The trust fund was necessary to allow Meadowlark to legally sell insurance in many states, including New Mexico. *Id.* at 1-2. The purpose of the fund, like the one in the instant case, was to provide security and a means of paying off claims against Meadowlark, should the company not survive financially. *Id.* at 2. The existence of the trust fund, like the one in the instant case, gave state regulators some assurance that Meadowlark would not simply sell insurance policies, pocket the proceeds, and move back offshore without paying the claims that might result from the sale of the policies. *Id.* at 2.

To ensure that sufficient assets would be available to satisfy potential claims against Meadowlark, the terms of the written trust agreement stated that a minimum of $1,500,000 would be maintained in the trust at all times. The minimum asset level, again like the one in the instant case, had to consist of three, and only three, types of assets: (1) cash in U.S. currency; (2) letters of credit; or (3) readily marketable securities. *Id.* at 2. The agreement recited that Meadowlark had already transferred a minimum of $1,500,000 in qualifying assets to the trust. *Id.*

In fact, at the time the trust agreement was signed, Meadowlark had transferred no assets to Sunwest. Meadowlark's principals were subsequently revealed to be criminals interested solely in defrauding their insured, and a Missouri court ordered Meadowlark into liquidation and appointed Craft as a special deputy liquidator. *Id.* at 2-3. After Craft discovered that Meadowlark had

substantially inflated the value of the assets held in trust, he sued Sunwest for the amount that would have been in the trust fund if Sunwest had not breached the trust agreement. Sunwest moved for summary judgment on the ground that Craft, as a receiver, had no standing to pursue his claims because he "stood in the shoes" of Meadowlark, and could only pursue those claims belonging to the company. *Id.* at 4.

In a thorough and well-reasoned opinion, the district court rejected this argument as "a matter of public policy in general, and of statutory interpretation in particular." *Id.* at 6. It first summarized a number of cases that have held, for various reasons, that receivers have standing to bring claims in a case such as this. *Id.* at 4-6 (citing *Four Star Insurance Agency, Inc. v. Hawaiian Electric Industries, Inc.*, 974 P.2d 1017, 1024-25 (Hawaii 1999) ("The exclusivity of the [Insurance] Commissioner's standing is necessary to minimize litigation and to ensure the equitable apportionment of losses."); *Corcoran v. Frank B. Hall & Company, Inc.*, 545 N.Y.S.2d 278, 281-83 (1989) (holding that Superintendent of Insurance had exclusive standing to assert general creditor claims possessed by all of the insurance company's creditors and policyholders); *Cordial v. Ernst & Young*, 483 S.E.2d 248, 256-57 (W.Va.1996) (applying statutory language and holding that a special deputy receiver had standing to bring claims against accounting firm, on behalf of defunct insurer as well as insurer's policyholders, creditors, and the public); *Bonhiver v. Graff*, 248 N.W.2d 291, 296-97 (Minn. 1976) (holding, with no discussion, that receiver represents rights of creditors and therefore may bring an action against

defendants charged with failing to discover fraud committed by company's own officers). The *Craft* court then concluded:

> The Court will follow the case law cited above and hold that [Craft], as the special deputy receiver or liquidator of Meadowlark, has standing to bring the . . . claims raised in this case. It is apparent that these claims, if successful, will benefit the estate of Meadowlark as a whole rather than any individual claimant. The claims are not designed to redress any individual injury suffered by a policyholder or creditor. Instead, they are intended to increase the assets available for division during the liquidation process.

Id. at 6.

> The court also addressed Sunwest's contention that Craft only raised claims of fraud or misrepresentation that were personal to the individual claimants by noting that "the issues remaining in this lawsuit are concerned only with the trust account itself rather than on any reliance that may have been placed on the existence of the trust account. Any recovery obtained in the case will simply replace funds that would otherwise have been in the trust account, and will not compensate any individual for damages suffered due to fraud or misrepresentation." *Id.* at 8. It seems to the court that this relief is identical to that sought by the Receiver in the case before it.

For these reasons, this court finds that, under Texas law and as a matter of public policy, the receiver here has

standing to bring its claims against Chase on behalf of Western Star's shareholders.[5]

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[5] As the court finds the Receiver has standing under Texas law to bring this claim against Chase, it need not discuss in as much detail the Receiver's standing under Florida law. However, it does note that, under Florida's version of the Uniform Insurers Liquidation Act, Part I, Chapter 631, Florida Statutes, the Florida Department of Insurance, when ordered to liquidate a domestic insurer, has the power:

> forthwith to take immediate possession of the property of the insurer, to marshal all the assets of the insurer, to liquidate its business, to deal with the insurer's property and business in its own name or in the name of the insurer, as the court may direct, and to give notice to all creditors who may have claims against the insurer to present such claims, as the court may direct.
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> . . . [to] take immediate possession of all the property, assets, and estate, including, but not limited to, all offices maintained by the insurer and all rights of action, books, documents, papers, evidences of debt, and all other property of every kind whatsoever and wheresoever located belonging to the insurer, including, but not limited to, all bank accounts, stocks, bonds, debentures . . . of the insurer and to hold all such assets pending further orders of the court.
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> § 631.111(1), (2), Florida Statutes.
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> The act also specifies the assets of the alien insurer which the receiver shall take into its possession:
>
> An order to liquidate the business of a United States branch of an alien insurer having trusteed assets in this state shall be in the same terms as those prescribed for domestic insurers, save and except only that the assets of the business of such United States branch shall be the only assets included therein.

D. *Standing of the Individual Policyholders*

Chase also argues that the terms of the Agreement expressly preclude breach of contract claims by the policyholders and other third parties. Motion at 18. It cites Section 2.5 of the Agreement, which provides:

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§ 631.121, Florida Statutes.

Florida law also contemplates that trusteed assets can only be withdrawn in limited circumstances:

(1) The trust agreement shall provide, in substance, that no withdrawals of trusteed assets shall be made by the insurer or permitted by the trustee or trustees without the written authorization or approval of the department in advance thereof, except as follows:

* * *

(d) For the purpose of transferring the trusteed assets to an official liquidator, conservator, or rehabilitator pursuant to the order of a court of competent jurisdiction.

* * *

(3) If at any time the insurer becomes insolvent, or if its assets held in the United States are less in amount than as required in § 624.412(1), upon determination thereof the department shall in writing order the trustee to suspend the right of the insurer or any other person to withdraw assets as otherwise authorized under paragraphs (1)(a), (b), and (c); and the trustee shall comply with such order until the further order of the department.

§ 630.081, Florida Statutes.

Reading the provisions of Part I, Chapter 631, and Chapter 630, Florida Statutes, *in pari materia*, the court does not see why the Receiver would be prohibited from recovering the trusteed assets of Western Star.

> 2.5 *Limitations of Policyholder's Source of Recovery:* No Policyholder or Third Party Claimant shall have any right of any nature or description under this Agreement to seek to enforce a Claim or otherwise bring an action against the Trustee in respect of any assets of the Trustee or of any assets other than those in the Trust fund. No Policyholder or Third Party Claimant, even after its Claim has become a Matured Claim, may require an accounting from the Trustee or inquire into the administration of the Trust, question any of the Trustee's acts or omissions or otherwise enforce this Agreement, the sole right of such Policyholder or Third Party Claimant under this Agreement being to receive the amount of its Claim after it has become a Matured Claim from the assets then in the Trust Fund and available for such payment under this Agreement.

In Texas, exculpatory clauses such as this are strictly construed, and the trustee is relieved of liability only to the extent to which it is clearly provided that the trustee shall be excused. *Jewett v. Capital National Bank of Austin*, 618 S.W.2d 109, 112 (Tex. Civ. App. – Waco 1981, writ ref'd n.r.e.) (citing RESTATEMENT OF TRUSTS SECOND § 222). "With regard to the construction to be placed on the clause in an instrument creating a trust limiting the liability of the trustee, it has been said: 'the meaning to be attributed to it should be consistent with the purpose and object of the trust, and a strict rule of construction should be applied as against the claim of restriction (of liability).' " *Jewett*, 618 S.W.2d at 112 (quoting 83 A.L.R. 618).

In *Jewett*, the court found the bank trustee had in fact done nothing in administering the trust from its creation in January 1970 until it was terminated, and this created a question of fact for claims against the trustee for negligence and breach of fiduciary duty sufficient to defeat a motion for summary judgment, despite the existence of exculpatory clauses which the court found did not, as a matter of law, relieve the trustee from liability. 618 S.W.2d at 112-13. In the instant case, allowing Chase to utilize the exculpatory clauses to relieve it from all responsibility for the quality and possession of the assets in the Trust Fund would defeat the very purposes of the Trust, which are plain:

> WHEREAS the Company [Western Star] desires to establish a trust fund in the United States as security for said Policyholders and Third Party Claimants and to qualify as an eligible or approved surplus lines insurer therein; and
>
> WHEREAS the Trustee [Chase] is willing to act as Trustee of such trust fund . . .

Agreement at 1.

Accordingly, this court finds that the individual policyholders would have standing to sue under this Agreement.

E. *Lack of Injury to Western Star*

Finally, Chase argues that the Receiver's complaint must be dismissed because it fails to allege any legally cognizable injury to Western Star, as opposed to injuries allegedly inflicted upon Western Star's policyholders and creditors. Defendant's Reply in Support of its Motion to

Dismiss ("Reply") at 4. Its reasoning is that since Western Star never had or paid to Chase the $5.4 million "represented value" of the Trust Fund, it is "axiomatic" that Western Star did not lose the $5.4 million "represented value" it is now seeking to recover. *Id.* at 6. This argument fails, however, as this court has ruled that the Receiver has standing to sue Chase for the injuries allegedly inflicted upon Western Star's policyholders and creditors.

The court notes in closing that, under Chase's premises, no one would have standing to sue in this case. Chase has argued, to no avail, that individual policyholders and Third Party Claimants have no contractual rights under the Trust, and that under the terms of the NAIC Trust Agreement they are barred. Motion at 18-19. Chase has also argued, again to no avail, that the Receiver has no standing because the claims asserted by the Receiver "are claims that only the policyholders and creditors themselves can bring." Brief at 8, ¶ 14. Yet if the Receiver cannot bring these claims because they belong only to the individual policyholders, and the individual policyholders cannot bring them because they are barred, then this court is at a loss as to who could bring a claim against Chase for the events alleged in the Receiver's complaint. Many wrongs but no rights is not the hallmark of either Texas or Florida jurisprudence.

III. CONCLUSION

For the above reasons, Chase's motion to dismiss the Receiver's claims pursuant to Rule 12(b)(6) is DENIED.

SO ORDERED.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-10272

FLORIDA DEPARTMENT OF INSURANCE, as receiver of Western Star Insurance Company Ltd

Plaintiff-Appellant

v.

CHASE BANK OF TEXAS NATIONAL ASSOCIATION, formerly known as Texas Commerce Bank National Association, formerly known as Ameritrust of Texas National Association

Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Texas, Dallas

(Filed Feb. 6, 2002)

Before REAVLEY, HIGGINBOTHAM and PARKER, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellant's motion to certify question to Florida State Supreme Court is DENIED.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-10272

FLORIDA DEPARTMENT OF INSURANCE, as receiver of Western Star Insurance Company Ltd

Plaintiff-Appellant

v.

CHASE BANK OF TEXAS NATIONAL ASSOCIATION, formerly known as Texas Commerce Bank National Association, formerly known as Ameritrust of Texas National Association

Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Texas, Dallas

ON PETITION FOR REHEARING

(Filed Jan. 15, 2002)

Before REAVLEY, HIGGINBOTHAM and PARKER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

/s/ Thomas M. Reavley
United States Circuit Judge